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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LIBERTY NATIONAL BANK & TRUST COMPANY OF LOUISVILLE (f/d/b/a UNITED KENTUCKY BANK, INC.) - - Petitioner

versus

KENNETH R. GEORGE and ALBERTA W. GEORGE - - - - - - - Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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75pp

QUESTIONS PRESENTED[1]

1. Whether, under the full faith and credit provisions of 28 U.S.C. §1738, a plaintiff's complaint filed in federal court alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") is barred by a prior state court decision against such plaintiff, in a case involving identical parties and the same claims, wherein the state court considered and rejected, on the merits, each and every allegation in the federal court complaint, and as to which decision state law would grant preclusive and final effect.

2. Whether all claims arising under RICO are exclusively within the jurisdiction of the federal courts.

3. Whether recovery upon a civil claim for treble damages under RICO requires that the plaintiff suffer damages by reason of the defendant's acquiring, maintaining control of or an interest in, or conducting the affairs of an "enterprise" through the commission of the statutorily proscribed offenses, as opposed to damages causally connected only to the defendant's commission of such offenses.

4. Whether Congress intended to authorize civil suits for treble damages under RICO in cases where the defendants have never been convicted of any predicate crime listed in the statute.

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[1]The Court has granted certiorari to review Questions 3 and 4 in *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 741 F. 2d 482 (2nd Cir. 1984), *cert. granted* ___ U. S. ___, 105 S. Ct. 901, (1985), Case No. 84-648, and *Haroco* v. *American Nat. B. & T. Co. of Chicago*, 747 F. 2d 384 (7th Cir. 1984), *cert. granted sub. nom. American Nat. B. & T. Co. of Chicago* v. *Haroco*, ___ U. S. ___, 105 S. Ct. 902 (1985), Case No. 84-822.

LIST OF ALL PARTIES

The petitioner in this matter is Liberty National Bank & Trust Company of Louisville (hereinafter referred to as "Liberty"). Liberty is a national bank located in Louisville, Kentucky. Its parent corporation is Liberty United Bancorp, Inc. Liberty has no affiliates, and has no subsidiaries other than wholly-owned subsidiaries.

On December 23, 1982, Liberty acquired and merged with another bank which was its predecessor in interest regarding this matter. This predecessor in interest was United Kentucky Bank, Inc. ("UKB"). The petitioner in this matter proceeded in the Kentucky state courts under the name of United Kentucky Bank, Inc., together with its then parent company United Kentucky, Inc., and Does 1-99 (still unspecified directors and employees of UKB and its parent).

The respondents in this matter are Kenneth R. George and Alberta W. George (sometimes hereinafter referred to as "respondents" or "the Georges"), former Kentucky residents.

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No._____

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LIBERTY NATIONAL BANK & TRUST COMPANY OF LOUISVILLE (f/d/b/a UNITED KENTUCKY BANK, INC.) - - *Petitioner*

v.

KENNETH R. GEORGE and ALBERTA W. GEORGE - - - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Liberty National Bank and Trust Company of Louisville respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered January 22, 1985.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is not yet reported but is contained in the Appendix hereto at page 1a. The opinion of the District Court for the Western District of Kentucky is not reported but is contained in the Appendix hereto at page 8a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on January 22, 1985, and petitioner's petition for rehearing was denied by that court on February 21, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Supreme Court Rule 17.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Title IX of the Organized Crime Control Act of 1970, as amended, 18 U.S.C. §§1961-1968 are set forth in the Appendix hereto at page 27a, as are the provisions of the other statutes listed in the Table of Authorities.

STATEMENT OF THE CASE

This petition for a writ of certiorari to the Sixth Circuit is based on the outcome of two separate but duplicative cases, one in the state courts of Kentucky, and one in the federal courts of the Sixth Circuit. The first judgment in Liberty's favor was rendered in the Circuit Court of Jefferson County, Kentucky in late 1982. Since then, that judgment has run the full course of appellate review in the Kentucky courts. Similarly, the dismissal of the federal court case, which was based on the preclusive effect of the state court judgment, has run the full course of appellate review in the federal system, except for this Court.

Recently, the Georges filed two petitions for writs of certiorari from this Court. Their petition for a writ to the Kentucky Court of Appeals was denied April 1, 1985, and their petition for a writ to the Sixth Circuit Court of Appeals was denied April 15, 1985.

Presented below is a narrative of the proceedings in the Kentucky courts, followed by a narrative of the proceedings in the federal courts. Also attached in the Appendix at page 34a is a chronological chart of proceedings as they occurred in both jurisdictions.

I. Proceedings and Disposition in the Kentucky Courts.

The state court proceedings began in the Jefferson County Circuit Court on October 27, 1981, when Liberty filed its complaint against the Georges. This state court suit was an action to collect in excess of $2,000,000 loaned to the Georges by Liberty, and to foreclose on collateral securing such sum.

On January 11, 1982, the Georges filed this action (including their RICO claims) against Liberty in the U. S. District Court for the Western District of Kentucky, and also filed a petition for removal which removed the Jefferson Circuit Court proceedings to the same U. S. District Court. The Georges then filed a perfunctory answer in the federal court action commenced by the removal. The U. S. District Court promptly remanded the state court proceeding back to the Jefferson Circuit Court, there being at that time, no jurisdictional basis for removal (i.e., incomplete diversity and no federal question).

Now back in state court, the Georges filed their "supplemental answer" to Liberty's complaint on March 1, 1982. The state court answer expressly incorporated all allegations of their January 11, 1982 complaint (including the RICO claims) by which the Georges initiated this separate federal court action against Liberty.

The state court supplemental answer contained defenses and counterclaims which were subsequently litigated in the state court by the Georges and Liberty. These defenses primarily challenged the validity of Liberty's prime rate lending practices. The supplemental answer accused Liberty of breach of contract, breach of fiduciary duty, and fraud (including mail fraud as a predicate to a RICO action) based on allegations that the Georges were charged Liberty's published prime interest rate at the same time other borrowers were allowed to borrow money from Liberty

based on a lower prime rate. In addition, the Georges claimed that Liberty's prime interest rate was illusory, since Liberty had discretion to move it up or down, and therefore, unenforceable.

The Georges' supplemental answer also challenged Liberty's use of the 365/360 method of calculating interest — a method in which interest for one quarter, one half or three quarters of a year is calculated by dividing the actual number of days by 90, 180 or 270, round numbers used for ease of calculation. The Georges likewise claimed that use of the 365/360 method of calculation constituted a breach of contract, breach of fiduciary duty and fraud.

After the filing of the supplemental answer on March 1, 1982, the state court case entered a period during which both sides took extensive discovery, including interrogatories, production of documents, and depositions. The discovery was by agreement to be used in either the state or federal case.

On August 20, 1982, Liberty filed in the state court an extensive motion for summary judgment supported by an affidavit from a Liberty loan officer explaining how Liberty established and changed its prime rate. The trial court heard arguments of counsel regarding summary judgment on *two* occasions—October 11, 1982 and October 21, 1982.

Summary judgment for Liberty was entered on October 25, 1982. (The judgment is attached in the Appendix at page 22a). The judgment held that the promissory notes were valid and collectible and that

Liberty was entitled to interest on the notes calculated according to Liberty's published prime rate. The judgment held against Liberty only on the limited issue of the 365/360 method of interest calculation, stating that interest should have been calculated on a 365/365 basis, and therefore, the Georges were entitled to an interest credit.

On November 4, 1982, the Georges filed in the trial court a motion to alter, amend or vacate the summary judgment, which motion was overruled in May, 1983. The motion was held in abeyance for approximately six months due to the Georges' having filed bankruptcy in Tampa, Florida, which bankruptcy was subsequently transferred to the U. S. Bankruptcy Court for the Western District of Kentucky.

The Georges then appealed to the Kentucky Court of Appeals. That court issued an opinion on February 24, 1984, affirming in part and reversing in part. The Court of Appeals reversed and remanded the case on the limited issue of the manner in which the interest credit was calculated. All other aspects of the summary judgment for Liberty were fully affirmed by the appellate court.

Subsequently, the Georges filed two more requests for review in the Kentucky appellate courts. The first was a petition for a rehearing filed in the Kentucky Court of Appeals. On July 18, 1984, after the petition for rehearing was denied, the Georges then filed a motion for discretionary review in the Kentucky Supreme Court. Finally, the Kentucky Supreme Court entered an order on November 8, 1984 denying the

Georges' motion for discretionary review, and the Georges' state court remedies were thus exhausted. A subsequent petition to this Court for a writ of certiorari to the Kentucky Court of Appeals was also denied.

II. Proceedings and Disposition in the Federal Courts.

On January 11, 1982, after filing of the state court action, the Georges filed the complaint in the instant case in the U. S. District Court for the Western District of Kentucky, alleging breach of contract, breach of fiduciary duty, fraud, and RICO/mail fraud claims. Jurisdiction was invoked on the basis of 28 U.S.C. § 1331 due to the RICO claim and of 28 U.S.C. § 1332 due to the Florida domicile of the Georges and Kentucky domicile of Liberty.

Except for the Georges' filing their "first amended complaint," which by its terms was intended only to "restate and clarify" the original complaint, on June 22, 1982, little action occurred in the district court case until mid-1983. On June 13, 1983, Liberty filed its motion to dismiss the complaint on the grounds of res judicata and collateral estoppel based on the state court judgment. The dismissal was granted September 30, 1983, subject to the case's being reopened if the state's summary judgment were overturned by a Kentucky appellate court. (The district court's opinion is included in the Appendix hereto at page 8a). Shortly thereafter, the Georges appealed to the Sixth Circuit.

While the Kentucky state court appeals were in process, the issues were fully briefed by both parties

in the Sixth Circuit. That court postponed its decision until after the Kentucky Supreme Court denied the Georges' petition for discretionary review of the Kentucky Court of Appeals affirmance. On January 22, 1985, the Sixth Circuit affirmed the District Court's dismissal on the basis of res judicata and collateral estoppel established by the state court summary judgment, *with one exception:* the issue of fraudulent inducement (as opposed to fraud in performance) was held not to have been "actually litigated"[2] in the Kentucky courts, and so not precluded by collateral estoppel as a basis for a RICO claim. That single issue was remanded to the District Court for trial. In all other respects, the dismissal was upheld.

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[2]Although fraud in general had been part of the Georges' claims from the beginning, their pleading of fraudulent inducement in particular was later offered by the Georges as an amendment to their defenses and counterclaims in the Jefferson Circuit Court. This amendment was offered on October 21, 1982, the date of the second hearing on Liberty's summary judgment motion, and was immediately denied. Not only was this amendment offered a whole year after the case commenced, but it was offered in violation of an agreement by the Georges with the Jefferson Circuit Court, whereby the Georges were required to consider the pleadings closed as a condition to the court's setting aside a default judgment previously rendered against them as a sanction for failure to comply with appropriate discovery orders. (This refused amendment is included in the Appendix hereto at page 38a.)

REASONS FOR GRANTING THE WRIT

This case presents basically two issues concerning fundamental policies of national jurisprudence. The first concerns the conflict between, on one hand, the principles of preclusion embodied in the full faith and credit provisions of 28 U.S.C. § 1738, and, on the other, exclusive federal jurisdiction to decide cases under a particular federal statute. How best to resolve the conflict between these two important public policies has been in some degree decided by this Court on previous occasions. However, the unique circumstances of this case require further consideration of the issue in order to avoid not only repetitive litigation but also unnecessary conflict between state and federal courts.

The second issue concerns the proper interpretation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), a statute which, although intended to reduce the acquisition and infiltration of legitimate businesses by criminal elements, has recently engendered volumes of lawsuits concerning no more than everyday business disputes which would ordinarily be resolved in state court. This case presents several unanswered questions concerning jurisdiction over RICO claims and the scope of the statute itself, which, having resulted in material conflicts among the Circuits and between the Circuits and state high courts, should be resolved.

I. Proper Application of Preclusion Rules Is Especially Important When a Federal Court Must Determine the Effects of a Prior State Court Decision.

It is axiomatic that at some point there must be an end to litigation. The age old rules of preclusion, which forbid relitigation in one court of claims and issues already decided in another court, have been universally adopted to fulfill that purpose. Innumerable cases have acknowledged the importance of rules precluding relitigation of questions already decided, and refined the principles thereof to the point where little disagreement remains as to the basic requirements of the most commonly cited preclusion rules, res judicata (or "claim preclusion") and collateral estoppel (or "issue preclusion").

Because our court system is intentionally bifurcated, preclusion rules are particularly important with respect to the interplay of state and federal courts. This principle is embodied in 28 U.S.C. § 1738, which provides that judicial proceedings of any state shall have "the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state from which they are taken . . ." This statute requires federal courts to respect and abide by the prior decisions of state courts, even on federal questions. *Marrese* v. *Am. Academy of Orthopaedic Surgeons,* — U. S. —, — S. Ct. —, 53 U.S.L.W. 4265 (March 4, 1985); *Kremer* v. *Chemical Construction Corp.,* 456 U. S. 461 (1982), *reh'g denied,* 458 U. S. 1133 (1982). The statute itself contains no express exceptions; by its terms alone, § 1738 appears to apply to all prior decisions of state courts.

However, a conflict arises when a prior state court has ruled on a claim within the exclusive jurisdiction of federal courts, because the state court is deemed to be without jurisdiction over the federal cause of action. *Marrese, supra,* 53 U.S.L.W. at 4267. Nevertheless, the preclusion principles of § 1738 will not be subordinated to the exclusive jurisdiction issue except on rare occasions where the policies and intent of Congress underlying the exclusively federal question are deemed to be more important than the principles of comity, efficiency, and finality underlying § 1738. The most common justification for this exception is that the federal statute provides more or different remedies than those obtainable in the state action. *Id.* Even so, this narrow exception to the finality of judgments has been further limited by decisions of this Court requiring that resolution of the preclusion/jurisdiction conflict be based on two considerations: first, an inquiry into state preclusion law to determine whether the subsequent claim would be barred by state law, and second, a balancing of the purposes of § 1738 versus the exclusive federal statute involved. *Id.*

The Sixth Circuit's decision requiring retrial in federal court of the issue of fraudulent inducement is based on a misunderstanding of the foregoing preclusion rules and the unique balancing of interests which the court must undertake in the context of exclusive federal jurisdiction. The opinion pays lip service to the full faith and credit requirements of 28 U.S.C. § 1738, and then acknowledges that state preclusion rules control, reciting Kentucky's general rules regard-

ing the specific elements of res judicata and collateral estoppel.[3] With respect to the fraudulent inducement issue, the Sixth Circuit summarily held that res judicata was not applicable because the Kentucky court lacked jurisdiction over the RICO claim, and that collateral estoppel was not applicable because the issue was not "actually adjudicated."[4] The Sixth Circuit totally failed to recognize, as this Court and other federal courts have done (including the district court in this case) that such a narrow construction of state preclusion rules is insufficient and inappropriate in the present context. Section 1738 cannot be overruled without a thorough inquiry into the jurisdictional policy with which it conflicts, and into the state law by which the federal court must be guided.

A. The Sixth Circuit's Opinion Conflicts with This Court's Decisions Requiring a Substantive Inquiry into State Preclusion Law.

There can be no doubt that the claim in issue would be precluded in a second Kentucky state action, regardless of whether RICO claims are under exclusive federal jurisdiction. Clearly, the Jefferson Circuit Court had jurisdiction over the fraudulent inducement claim, a simple matter of state common law. And under Kentucky's Rules of Civil Procedure (essentially identical to the Federal Rules), failure to join that claim in the first action (or as in this case, inability

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[3]These rules match those of most jurisdictions and are set forth in the Appendix hereto at page 37a.

[4]It was offered as an eleventh hour amendment to the Georges' defenses and counterclaims which was disallowed by the state court as contrary to a previous court order. See footnote 2 *supra*.

to join it as a court-imposed sanction) bars it permanently. *England* v. *Coffey,* 350 S. W. 2d 163 (Ky. 1961). Furthermore, the Kentucky court's refusal to permit the fraudulent inducement amendment to the pleadings was a decision on the merits under Kentucky law. *Wren* v. *Cooksey,* 159 S. W. 1167 (Ky. 1913); *see also Poe* v. *John Deere Co.,* 695 F. 2d 1103 (8th Cir. 1982); *Eliason Corp.* v. *Bureau of Saf. and Reg. of Mich.,* 564 F. Supp. 1298 (W.D. Mich. 1983).

The district court in this case was completely correct in holding that the state court's specific finding of no intent to defraud is absolutely conclusive on the issue of mail fraud, and thus RICO. (See Appendix at 18a). There is no question that the Jefferson Circuit Court's disposition of the fraudulent inducement issue was intended to be, and in another Kentucky court would be, absolutely final.

B. The Sixth Circuit Opinion Fails to Apply the Balancing Test Required by 28 U.S.C. §1738

In *Kremer* v. *Chemical Construction Corp.,* 456 U. S. 461, *supra,* this Court considered the preclusive effect of a prior state court judgment in a case where the parties, transactions, rights violated, and legal standards were all the same, even though the statutory basis for recovery was a state statute (an anti-discrimination in employment law) in the state court action, and a federal statute (Title VII of the Civil Rights Act of 1964) in the federal court action. Because elements legally necessary to recovery under the federal claim had already been adjudicated in a state administrative action and later affirmed by a New York Ap-

pellate Division court, and because the parties, transactions, and alleged wrongful acts were the same, this Court affirmed the trial court's dismissal of the federal action.

One signal aspect of the *Kremer* case is that this Court's opinion spoke primarily in general terms of preclusion, without significant reference to the more specific theories of res judicata and collateral estoppel.[5] This more general mode of expression logically derives from the Court's determination that deciding whether Title VII cases are within the exclusive jurisdiction of federal courts was not required, in which case the technical differences between the two theories were not dispositive. In any event, *Kremer* and cases like it[6] indicate that preclusion is not by any means wholly dependent on jurisdiction; rather, in each case the purposes underlying preclusion and exclusive jurisdiction must both be carefully considered.

The decision of the Sixth Circuit in this case substantially undermines the important policy codified in

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[5]The District Court in *Kremer* had found the matters to be res judicata.

[6]*See, e.g., Derish* v. *San Mateo-Burlingame Bd. of Realtors*, 724 F. 2d 1347 (9th Cir. 1983) and *Nash County Bd. of Ed.* v. *Biltmore Co.*, 640 F. 2d 484 (4th Cir. 1981), *cert. denied*, 454 U. S. 878, *reh'g denied*, 454 U. S. 1117 (1981) (antitrust laws); *Red Fox* v. *Red Fox*, 564 F. 2d 361 (9th Cir. 1977) (Indian Civil Rights Act); *Luebke* v. *Marine Nat. Bank of Neenah*, 567 F. Supp. 1460 (E. D. Wis. 1983) (RICO); *Nesglo, Inc.* v. *Chase Manhattan Bank, N.A.*, 562 F. Supp. 1029 (D. Puerto Rico 1983) (Tie-in Amendments to Bank Holding Company Act of 1970); *Connelly* v. *Balkwill*, 174 F. Supp. 49 (N. D. Ohio 1959), *aff'd.*, 279 F. 2d 685 (6th Cir. 1960) and *Kaufman* v. *Schoenberg*, 154 F. Supp. 64 (D. Del. 1954) (Securities Exchange Act violations).

§1738 and explained in *Kremer, supra,* particularly where, as here, the federal statute presumed to grant exclusive federal jurisdiction (*i.e.*, RICO) is frequently predicated on common business disputes ordinarily resolved by state law. The decision also fails to consider that in cases such as these, the technical rules of res judicata and collateral estoppel are supplemented by broader preclusion principles necessarily compatible with the requirements of §1738. But most importantly, the Sixth Circuit's neglect of the special considerations surrounding preclusion rules in the context of exclusive federal jurisdiction has put in doubt the finality of every state court decision concerning ordinary fraud which *might* conceivably form the predicate to a RICO action.

C. It Is Imperative for Purposes of Comity and Finality That the Sixth Circuit's Decision Be Reviewed.

Nothing is more indicative of the Sixth Circuit's failure in this case to give due consideration to applicable preclusion rules than its holding that the issue of fraudulent inducement could support a RICO claim, when the Georges themselves never made such an allegation in their federal court RICO complaint. The only predicate alleged for their RICO claims was mail fraud (18 U.S.C. §1341) based on Liberty's mailing of interest rate changes and payment notices. The only basis for fraudulent inducement set forth in their offered amendment (see Appendix, page 38a) to their state court defenses and counterclaims was a bank officer's oral statement regarding expectations of future changes in the prime rate. Neither the amendment

offered in state court nor the Georges' complaint in federal court asserted a connection between alleged fraudulent inducement and mail fraud or any other of the underlying crimes which must be found for RICO to apply. Considering the overabundance of RICO claims today, it is indeed puzzling that the Sixth Circuit would feel compelled to find a new claim where none was previously alleged.

The Sixth Circuit's remand of the fraudulent inducement issue contravenes every logical and equitable basis for application of the rules of preclusion which have governed in the courts of this nation since its birth. To permit this decision to stand will be to open up the federal district courts to a flood of unnecessary relitigation, not only under RICO but also under every other federal statute over which federal courts have exclusive jurisdiction, and will threaten the finality of a multitude of state court judgments, in patent contravention of the full faith and credit requirements of 28 U.S.C. §1738. For these reasons, petitioner respectfully requests that this Court grant certiorari to resolve the substantial federal/state conflict which it creates.

II. Jurisdiction Over RICO Claims Is an Issue of Growing Nationwide Concern.

Closely allied to the issue of preclusion rules applicable by virtue of a prior state court judgment on a RICO claim is the issue of whether federal courts have exclusive jurisdiction over such claims. Both the spirit and letter of 28 U.S.C. §1738 suggest that preclusion rules should usually apply regardless of the jurisdic-

tion question. However, if state courts have concurrent jurisdiction over RICO claims, the preclusion issue presented in this case and discussed above will be automatically resolved, because the question arises only in the context of exclusive federal jurisdiction.

As noted previously, this Court has on at least one prior occasion specifically avoided deciding an exclusive jurisdiction question in favor of finding res judicata without reference to the jurisdictional issue. (*Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, *supra*), concerning discrimination under Title VII of the Civil Rights Act of 1964.) Nevertheless, Liberty submits that the issue as it concerns RICO is one of tremendous importance, particularly if resolution of the preclusion issue discussed above is left unsettled, or results in a rule of law not favoring preclusion. Considering the present multitude of RICO cases, many of which are based on common law fraud claims, failure to resolve this issue of exclusive federal jurisdiction may well result in substantial and unnecessary relitigation in federal court of volumes of cases previously tried in state courts. Although a burdensome caseload in federal court is not by itself any justification for determining that state courts have concurrent jurisdiction over RICO, it is nevertheless an important factor in determining the intended scope and application of the RICO statute.

The general rule is that state courts are *presumed* to have concurrent jurisdiction over federal statutes unless the statute expressly states otherwise. *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, 478

(1981). The RICO statute itself says nothing about exclusive federal jurisdiction. To date, it appears that only one major area of federal law, antitrust, has been held to be within exclusive federal jurisdiction absent an express provision in the statutes. Although the remedies provided by the RICO Act are modelled after the antitrust statutes, the two laws have widely divergent purposes, antitrust to promote competition among legitimate businesses, and RICO to shut down businesses which are criminal enterprises or to purge them of criminal elements. *See, e.g., Furman* v. *Cirrito,* 741 F. 2d 524 (2nd Cir. 1984). Thus, the RICO Act need not be interpreted in the same manner as the antitrust laws with respect to jurisdiction.

In addition, the factors usually cited to support exclusive jurisdiction, such as (a) uniform interpretation, (b) federal judges' expertise in federal law, (c) the benefits of the Federal Rules of Civil Procedure, and (d) hospitality to enforcement of the claims, *Nash County Bd. of Ed.* v. *Biltmore Co.,* 640 F. 2d 484 (4th Cir. 1981), are not present here. On the contrary, federal court interpretations of RICO are tremendously inconsistent, and the predicate acts required are often state common law claims with which state court judges are naturally familiar. In addition, Kentucky has essentially the same procedural rules, and the state no doubt has as much interest as the federal government in eliminating the evils to which RICO was intended to apply.

The exclusive jurisdiction issue by itself has not yet resulted in a conflict between circuits. Nevertheless,

it has caused two federal district courts in the same circuit to take diametrically opposite positions, one holding that jurisdiction over RICO claims is exclusively federal, and the other holding that it is not. *County of Cook* v. *Midcon Corp.*, 574 F. Supp. 902 (N.D. Ill. 1983); *Luebke* v. *Marine Nat. Bank of Neenah*, 567 F. Supp. 1460 (E.D. Wis. 1983). In what are apparently the only other cases involving this question, the Sixth Circuit in this case has impliedly agreed with *Cook*, and a New York state court has followed *Luebke*. *Greenview Trading Co.* v. *Hershman & Leicher*, 473 N.Y.S. 2d 722 (Sup. 1984). It is only a matter of time before the disagreement reaches the circuit court level. Therefore, unless this Court finds the scope of RICO to be as limited as the Second Circuit has in the *Sedima* case, *supra*,[7] it is important that the issue of exclusive federal jurisdiction over RICO be resolved.

III. Decisions of Several Circuits Directly Conflict as to the Type of Injury Required for Recovery on a RICO Claim.

There is little controversy regarding the primary purposes of the RICO statute, to address the acquisition and infiltration of legitimate businesses by criminal elements. However, the reported cases diverge radically on the elements required to recover on a civil RICO claim, from limited interpretations which require that the activities in question involve what is clearly "organized crime,"[8] to much more liberal in-

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[7] *Sedima S.P.R.L.* v. *Imrex Co., Inc.*, 741 F. 2d 482 (2nd Cir. 1984), *cert. granted* — U. S. —, 105 S. Ct. 901 (1985).

[8] *See, e.g., Hokama* v. *E. F. Hutton & Co.*, 566 F. Supp. 636, 643 (C. D. Cal. 1983).

terpretations which find the statute purposefully encompassing numerous "garden variety" commercial transactions in order to avoid missing a few criminal ones.[9]

In any event, there is little doubt at this point that the phenomenal lack of consensus among federal courts, including several circuits, on the elemental requirements for recovery under RICO presents questions which beg for resolution by this Court.

Among the issues already widely considered are (1) whether RICO requires some nexus between the challenged activity and "organized crime", (2) whether plaintiffs must allege a "competitive" injury, (3) whether there must be criminal convictions for the statute's underlying predicate acts to sustain a RICO claim, and (4) whether the damage alleged must arise from a "racketeering" type injury and not simply injury casually connected only to the predicate acts. At present the most controversial appears to be the "racketeering injury" issue which is presented in the instant case. This Court is currently considering two other cases involving that question: *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 741 F. 2d 482 (2nd Cir. 1984), *cert. granted* — U. S. —, 105 S. Ct. 901 (1985), Case No. 84-648, and *Haroco* v. *American Nat. Bank & Trust Co. of Chicago*, 747 F. 2d 384 (7th Cir. 1984), *cert. granted sub. nom. American Nat. Bank & Trust Co. of Chicago* v. *Haroco*, — U. S. —, 105 S. Ct. 902 (1985), Case No. 84-822. Since in this case the respondents' pleadings

[9]*See, e.g., Schacht* v. *Brown*, 711 F. 2d 1343 (7th Cir. 1983), *cert. denied*, — U. S. —, 104 S. Ct. 508, (1983).

claim damage from no more than fraudulent inducement,[10] a finding by this Court that special injury is required should dispose of the case as a matter of law.

The instant case involves facts astonishingly similar to those in the *Haroco* case. Like American National Bank in *Haroco,* Liberty has been charged with RICO violations stemming from the alleged improper setting and charging of its prime interest rate, and use of the mails to notify and bill the respondents. By tagging a RICO claim to their common law claims of fraud, breach of contract and breach of fiduciary duty, respondents have succeeded (like their counterparts in *Haroco*) in turning a simple state foreclosure action into a federal case, subjecting Liberty not only to the possibility of treble damages and the stigma of being found guilty of *criminal* fraud, but also to a trial de novo in federal court, after the transactions involved have already been repeatedly litigated in three Kentucky courts, two federal courts, and two bankruptcy courts. By no stretch of the imagination can it be presumed that this result was intended by Congress in enacting the RICO statute.

This case and the *Haroco* case may be described as representative not only of several cases now pending, but also of myriad cases which will no doubt arise in the future unless the scope of the RICO statute is properly construed by this Court to correspond with the purposes for which the statute was enacted. Interestingly, while interpreting RICO quite broadly,

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[10]Liberty again notes that respondents' refused amendment which pleaded fraudulent inducement makes no mention of RICO.

the Seventh Circuit Court in *Haroco* nevertheless quite aptly confirmed the point here presented, *i.e.,* that it *"does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank."* 747 F. 2d at 399.

Whether one labels the instant issue as a "racketeering injury" requirement, as in *Haroco,* or more generally as a requirement of "injury of the type the RICO statute was intended to prohibit," is really of no moment. There is no need to delineate the precise scope of the statute in minute detail. In view of the well settled purposes of RICO, however, there is a patent need to restrict the application of the statute more closely to those transactions which are related to its purposes.

The terms of the RICO statute itself certainly indicate that more than just the predicate criminal acts are required. The right of civil action provided in 18 U.S.C. §1964 permits private individuals to bring suit only for injuries "by reason of a violation of Section 1962."[11] Section 1962 does not list the predicate crimes; rather it describes the requisite "pattern" of racketeering activity and the undertaking of such activity to "acquire", "maintain", or "conduct" an "interprise" through such pattern of activity. Section 1964 makes no direct reference to the predicate crimes; they are listed in Section 1961, which is reached only by refer-

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[11] *Cf. Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U. S. 477 (1977) (in re antitrust laws, "by reason of" requires special antitrust injury).

ence from Section 1962, not Section 1964. This arrangement strongly suggests that civil liability under RICO requires not only commission of two or more predicate acts, but also a certain type of relationship between the predicate acts and the enterprise. It is only through this "pattern" and its relationship with the enterprise that the characteristics of "organized crime" appear, and RICO liability should arise.

Some courts have struggled to define this special "RICO injury" more precisely, while others have found it easier to deny that one is required. Nevertheless, that a statute is difficult to construe is no justification for failing to do so, particularly where such inaction creates the likelihood of massive litigation imposing substantial penalties on activities for which adequate common law and other statutory remedies already exist, and which are clearly not within the purview of the RICO statute.

Considering the already vast array of different interpretations of RICO, the necessity for interpretive guidelines by this Court is apparent. Otherwise, the federal courts will continue to be deluged with simple commercial contract and tort cases renamed "RICO violations", and the decisions rendered will continue to ride off in all directions. Without such clarification, RICO will continue to inject uncertainty into ordinary commercial transactions and create a trend of forum shopping to take advantage of the variant interpretations. For these reasons, the present situation must not be permitted to continue.

IV. Although RICO Clearly Provides Remedies Only for Criminal Wrongs, Courts Are Divided on the Proof and Procedures Required Under the Statute's Private Civil Action Provisions.

Even more basic that the "racketeering injury" question is the issue of the requirements in a private RICO action for establishing the necessary predicate crimes. If, as Liberty contends, a successful RICO action requires conviction of the predicate crimes, then this case will be resolved as a matter of law.

On this issue, the circuits have likewise taken polar positions, the Second Circuit holding that a civil RICO recovery requires conviction of a predicate crime,[12] the Sixth and Seventh Circuits holding that it does not.[13] However, it is clear from the face of the statute, and even the Second and Seventh Circuits agree,[14] that the wrongful conduct which RICO can remedy must be *criminal.* More specifically, RICO does not remedy civil wrongs; it merely provides a private civil remedy for *criminal* wrongs. As a criminal statute then, due process requires that RICO be strictly construed. *See, e.g., Dunn* v. *United States,* 442 U. S. 100, 112 (1979). However, there is also authority requiring that the RICO statute requires "liberal construction" (Title IX, Pub. L. 91-452, Section 904(a)), but if this means

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[12] *Sedima, supra,* at p. 496.

[13] *USACO Coal Co.* v. *Carbomin Energy, Inc.,* 689 F. 2d 94, 95 n. 1 (6th Cir. 1982); *Bunker Ramo Corp.* v. *United States Business Forms, Inc.,* 713 F. 2d 1272, 1287 (7th Cir. 1983). The Sixth Circuit's remand in this case, there being no criminal convictions, also impliedly denies that RICO requires such convictions.

[14] *Sedima, supra* at 501; *Haroco, supra,* at 404.

the predicate crimes must be liberally construed also, serious questions concerning the resulting lack of due process guaranteed to criminal defendants could render RICO constitutionally infirm.

Additional inconsistencies are created where, as in this case, a civil action is presumably[15] predicated on mail fraud. It is evident that there is no private right of action for mail fraud, yet if RICO claims based on merely two acts of mail fraud can be sustained without a prior criminal conviction, then RICO plaintiffs will have succeeded in doing indirectly what they could not do directly. Constitutional considerations and simple logic both dictate that a RICO defendant cannot be held liable for a criminal act and subjected to punitive penalties without the standards of proof and other constitutional safeguards of criminal procedure.

Among these safeguards is the use of prosecutorial discretion in criminal cases, prosecutors being generally inclined to maximize benefits by pursuing only the more egregious violations. With civil RICO, however, private plaintiffs have just the opposite incentive: they can federalize their claims and sue for treble damages merely by tacking a RICO label to any garden-variety contract or fraud claim. Indeed, the mass of civil RICO cases involving simple commercial transactions which have been filed in recent years proves the point. As was so aptly stated by the respondents in *Sedima,* civil RICO has become "a virtually limit-

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[15]See note 2, *supra,* regarding the lack of any mail fraud allegation in connection with fraudulent inducement, the sole issue remanded for trial.

less fount of federal jurisdiction over commercial disputes."[16]

The significant variation in predicate requirements depending on whether or not a prior conviction is deemed required for civil RICO highlights the apparent inconsistencies in the statute itself. When most of the RICO statute was drafted, there was no provision for a private right of action; that portion was added at the last moment. Even the severely divided Second and Seventh Circuits agree that very little thought was given to the civil provisions and how they were intended to work within the primarily criminal context of RICO.[17] They also agree that civil RICO actions have cut a much broader swath than Congress ever intended.[18]

The major difference between *Sedima* and this case on one hand, and *Haroco* on the other is the conclusion which each court draws from the legislative history of RICO with respect to the interpretation and application of civil RICO. In that regard, greater polarity between the courts can hardly be found. Liberty is one of the victims of that unintended development, which can be timely remedied only by this Court.

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[16]*Sedima, supra,* Brief of Respondents Imrex Co., Inc., et al. at 7.

[17]*Sedima, supra,* at 490; *Haroco, supra,* at 393.

[18]*Sedima, supra,* at 492; *Haroco, supra,* at 399.

CONCLUSION

To maintain the appropriate comity and respect between state and federal courts as required by 28 U.S.C. §1738, and to resolve the substantial differences among the courts of this country with regard to the interpretation of the Racketeer Influenced and Corrupt Organizations Act, Liberty's petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SIXTH CIRCUIT OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-5750

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH R. GEORGE and
ALBERTA W. GEORGE, - - - *Plaintiffs-Appellants,*

v.

UNITED KENTUCKY BANK, INC.,
UNITED KENTUCKY, INC., and
DOES 1 through 99, - - - *Defendants-Appellees.*

Appeal From the United States District Court for the Western District of Kentucky at Louisville

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OPINION—Decided and Filed January 22, 1985

Before CONTIE, Circuit Judge; PHILLIPS, Senior Circuit Judge; and GILMORE, District Judge.*

PHILLIPS, Senior Circuit Judge. This is an appeal by plaintiffs Kenneth R. and Mrs. Alberta W. George (hereafter "Georges") from the judgment of the District Court dismissing their complaint upon the ground that their cause of action and the issues raised therein are barred by the doctrines of *res judicata,* collateral estoppel and the Full Faith and Credit Act, 28 U.S.C. § 1738. The Georges also appeal from the earlier order of the District Court dismissing that part of their complaint which alleged a viola-

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*Honorable Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, sitting by designation.

tion of the Kentucky Unfair Trade Practices Act, K.R.S. 365.050. The decision on the latter issue became final and appealable when the District Court dismissed the remainder of the complaint.

The Georges sought damages against United Kentucky Bank, Inc. and United Kentucky, Inc. (hereafter "U.K.B." or "the Bank") and "Does 1 through 99" (unspecified directors and employees who allegedly acted on behalf of the defendant Bank and the defendant Holding Company to establish the policies or to carry out the conduct challenged in this case). The defendants were charged with defrauding the plaintiffs in a series of loans made by the Bank to the Georges. The complaint charged a R.I.C.O. claim, 18 U.S.C. § 1962(c), which was based in part upon a mail fraud claim, 18 U.S.C. § 1341; and a number of State law claims with jurisdiction asserted upon diversity of citizenship.

I

Prior to the initiation of the present suit by the Georges in the United States District Court, the Bank filed a foreclosure action against the Georges in the Circuit Court of Jefferson County, Kentucky, Case No. 81-CI-09925, styled *United Kentucky Bank, Inc.* v. *Kenneth R. George, et al.* The basis for the foreclosure action was the Georges' default on a series of five loans made by U.K.B. to the Georges in the original amount of $2,700,000.00.

The Georges filed pleadings in the State Court action, to which were attached a copy of their complaint in the present case. The District Court held that the Georges raised and prosecuted in the State Court action defenses or counterclaims involving the same questions of law and fact presented in the Federal Court litigation.

After discovery proceedings in the State Court, the Bank moved for summary judgment. The State Circuit Court sustained the Bank's motion for summary judgment

on almost all issues. The State Court ruled, however, that the Bank calculated interest on an unacceptable basis and awarded to the Georges a credit of $11,022.58 for overcharges on interest. The State Court expressly held that the Bank was not guilty of any fraud or breach of fiduciary duty owed by it to the Georges "due to the established industry practice followed and lack of intent" by the Bank. After directing that the Georges recover the specified amounts for overcharges on interest, the State Court ordered that "all counterclaims and affirmative defenses as filed by the defendants (the Georges) are hereby dismissed as herein-before set out."

II

The District Court dismissed the complaint in the present case in a memorandum opinion rendered September 30, 1983, holding as follows:

> This Court must give the same recognition to the judicial rulings of the Kentucky courts to which those rulings are entitled in Kentucky. 28 U.S.C. § 1738. *St. John* v. *Wisconsin Employment Relations Board,* 340 U. S. 411, 414 (1951); *Rollins* v. *Dwyer,* 666 F. 2d 141, 144 (5th Cir. 1982). See, generally, 1B Moore's Federal Practice, Para. 0.416[1] (2nd Ed. 1983). *Res judicata* provides that a final judgment on the merits bars all claims based upon the same complaint by the parties or their privities, including those claims which were not but could have been litigated. *Montana* v. *United States,* 440 U. S. 147, 153 (1979); *Brown* v. *Felsen,* 442 U. S. 127, 131 (1979); *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, 375 (1940). Collateral estoppel provides that once issues or facts which are necessary to the judgment are actually litigated and decided by a court of competent

jurisdiction, any determination by that court is conclusive and binding on the parties in any subsequent suit between the parties, even if the second suit is based upon a different complaint. *Montana* v. *United States, supra; Allen* v. *McCurry,* 449 U. S. 90, 94-96 (1980). In essence, the parties are bound by issues and facts which have been adjudicated. See generally, *Kremer* v. *Chemical Construction Corporation,* 456 U. S. 461, 102 S. Ct. 1883, 1889 n.6 (1982); *Newman* v. *Newman,* 451 S. W. 2d 417, 419 (Ky. 1970); *Restatement (Second) of Judgments,* Sections 17, 18 and 27 (1982).

The District Judge held that the actionable facts in the present case were before the State Court and that the State Circuit Judge reached or could have reached all the issues with the exception of the R.I.C.O. claim. With respect to the R.I.C.O. claim the District Court ruled that the finding by the State Court that there was no "fraud" on the part of U.K.B. was sufficient to act as a collateral estoppel to fraud alleged in the R.I.C.O. action.[1]

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[1]After the decision of the District Court, the Court of Appeals of Kentucky in an unpublished opinion rendered February 24, 1984, (No. 83-CA-343-MR) affirmed the decision of the Jefferson County Circuit Court on the issues relating to fraud. However, the State Court of Appeals granted relief on the Bank's cross-appeal with respect to the $11,022.58 credit allowed by the trial court to the Georges. The State Court of Appeals held that the State trial court was correct in all respects "except as to the actual dollar amount allowed as a credit" to the Georges. The judgment was reversed and remanded to the State Court for "computation of the difference of fractional percentage to be allowed as the credit."

During the oral arguments of the present case before this Court on September 26, 1984, counsel advised that a motion for discretionary review of the decision of the State Court of Appeals was pending in the Supreme Court of Kentucky. This Court postponed a decision in the present case until action by the Supreme

(Footnote continued on following page)

We affirm in part and reverse and remand in part, for the reasons set forth in this opinion.

III

We agree with the District Judge that a Federal Court must give to a State Court judgment the same preclusive effect as would be given that judgment under the law of the State in which judgment was rendered. 28 U.S.C. § 1738. *Migra* v. *Warren City School District Board of Education*, ___ U. S. ___, 104 S. Ct. 892, 896 (1984); *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, 466 n.6 (1982); *Allen* v. *McCurry*, 449 U. S. 90 (1980).

In Kentucky the doctrine of *res judicata* is applicable when there is identity of parties, identity of causes of action and the first action is decided on its merits. *Newman* v. *Newman*, 451 S. W. 2d 417, 419 (Ky. 1970); *see also Stephens* v. *Goodenough*, 560 S. W. 2d 556, 558 (Ky. 1977); *Hays* v. *Sturgill*, 302 Ky. 31, 193 S. W. 2d 648, 650 (1946). Kentucky courts also apply the doctrine of collateral estoppel. *Ward* v. *Southern Bell Telephone and Telegraph Co.*, 436 S. W. 2d 794, 796 (Ky. 1968), *overruled on other grounds, Commonwealth of Kentucky Department of Transportation, Bureau of Highways* v. *Louisville Gas & Electric Co.*, 526 S. W. 2d 820, 822 (Ky. 1975).

The Georges contend that *res judicata* cannot act to bar their absolute right to present their claims in a federal forum. The Supreme Court rejected this contention in *Allen* v. *McCurry, supra*, 449 U. S. 90, 103-04 (1980).

However, the record in the State Court proceedings reveals that the Georges made a motion in that Court to

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(Footnote continued from preceding page)
Court of Kentucky on the motion pending in that Court. The Supreme Court of Kentucky entered an order on November 8, 1984 denying the motion for discretionary review.

amend their answer so as to include the affirmative defense of fraud in the inducement, as opposed to fraud in the execution of the contract. The State Court refused to permit this amendment. Since this claim of fraud in the inducement was not adjudicated in the State Court proceedings and arguably could form the basis of a R.I.C.O. action, we conclude that the District Court erred in dismissing the R.I.C.O. claim.

IV

The Georges also charged the Bank with violations of the Kentucky Unfair Trade Practices Act, K.R.S. 365.050. The District Court dismissed this count of the complaint on the ground that this statute is inapplicable to commercial lending institutions. The Georges appeal. We agree with the District Judge's interpretation of the statute and affirm on this issue.

V

The decision of the District Court is affirmed on all issues except the charges of violation of the R.I.C.O. statute, 18 U.S.C. § 1962(c), with respect to the allegations of fraud in the inducement. This part of the judgment is reversed for the reasons set forth in the last paragraph of Part III of this opinion. In all other respects the judgment of the District Court is affirmed.

Affirmed in part, reversed in part, and remanded to the District Court for further proceedings not inconsistent with this opinion. No costs are taxed. The parties will bear their own costs on this appeal.

SIXTH CIRCUIT DENIAL OF REHEARING

No. 83-5750

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KENNETH R. GEORGE and
ALBERTA W. GEORGE, - - - *Plaintiffs-Appellants,*

v.

UNITED KENTUCKY BANK, INC.,
UNITED KENTUCKY, INC., and
DOES 1 through 99, - - - *Defendants-Appellees.*

ORDER DENYING PETITION FOR REHEARING

Filed February 21, 1985

Before CONTIE, Circuit Judge, PHILLIPS, Senior Circuit Judge, and GILMORE, District Judge.*

Appellees have filed a petition for rehearing.

Upon consideration, the Court concludes that the petition presents no issues requiring rehearing.

Accordingly, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the Court.

(s) John P. Hehman
Clerk

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*Honorable Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, sitting by designation.

DISTRICT COURT OPINION

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 82-0021 L(A)

KENNETH R. GEORGE and
ALBERTA W. GEORGE, - - - - - *Plaintiffs,*

v.

UNITED KENTUCKY BANK, INC.,
UNITED KENTUCKY, INC., and
DOES 1-99, - - - - - - - - *Defendants.*

MEMORANDUM OPINION

Kenneth R. George and Alberta W. George ("Georges") bring this action against the United Kentucky Bank ("UKB") seeking damages for allegedly defrauding the plaintiffs during several loan transactions. Jurisdiction is based upon diversity, 28 U.S.C. §1332. Plaintiffs also allege a complaint under both 18 U.S.C. §1962(c), "RICO", and 18 U.S.C. §1341. "Mail Fraud." [*sic*] Initially, the plaintiffs moved for an expedited production of documents. This Court sustained that motion in part. The plaintiffs now move this Court to modify that order. The defendants also moved this Court for a protective order precluding discovery on the grounds of *res judicata,* collateral estoppel, and full faith and credit. The defendants responded contending that such an order would effectively dismiss the case. The plaintiffs subsequently moved to dismiss the case, citing the same grounds of *res judicata,* collateral estoppel, and full faith and credit. 28 U.S.C. §1738; Fed-

eral Rule of Civil Procedure 12(b). After careful consideration, this Court sustains the motion to dismiss.

This case arises out of a series of loan transactions between the UKB and the Georges. Essentially, the Georges agreed to a "floating" or "variable" interest rate which was based upon a rate described as the "prime rate," a rate which the UKB allegedly charged its best customers. The parties agreed that the rate would fluctuate, but according to the Georges' amended complaint, the UKB "represented to the plaintiffs that, as a matter of fact, defendants UKB and employees were possessed of no reasonable expectation that the prime rate of defendant UKB would ever exceed, at the absolute maximum, thirteen (13%) percent." First Amended Complaint, Para. 26.

Subsequently, the UKB charged the Georges an interest rate in excess of 13%, allegedly due to fluctuating economic conditions. The Georges protested the increased rates and finally ceased payment on the notes. The UKB moved to foreclose the notes and to attach the Georges' property in Louisville which was secured as collateral for the loans. The UKB filed that action in Jefferson Circuit Court (court of general jurisdiction), Louisville, Kentucky. Meanwhile, the Georges filed this action and amended their complaint. Then, the Georges filed an answer in state court, adopting the allegations in this complaint and amended complaint as "additional defenses" and "incorporated by reference" those claims in the state court answer.

After discovery proceedings, the UKB, plaintiff in the state court proceeding, moved for summary judgment. The Georges, defendants in the state court proceeding, contended that the UKB defrauded them by (1) misrepresenting the "prime rate" and (2) calculating the "per annum" interest rate on a 360-day basis rather than on a 365-day basis. The state court overruled the Georges' motion

to amend their answer to state the defense of fraud in the inducement relating to the notes.

The Jefferson Circuit Court, the Honorable Richard A. Revell, Judge, sustained the UKB's motion for summary judgment on almost all issues. First, Judge Revell found that the UKB calculated interest on a 360-day basis and that this traditional practice was not acceptable with the use of modern computer technology, and that the defendants (the Georges) were entitled to a credit of $11,022.58 for overcharges on the interest on their loans up to and including March 1, 1981. However, Judge Revell found that the Georges' "claim of breach of fiduciary duty and fraud for plaintiff's calculation using the 360-day basis is unfounded due to the established industry practice followed and lack of intent by the plaintiff(.)" *United Kentucky Bank, Inc.* v. *George,* 81 CI-09925, Jefferson Circuit Court, October 25, 1982 ("Revell Op."), at 1-2.

Second, Judge Revell found that the UKB "has not been arbitrary in calculation of its prime rate by using the methodology of adjusting its prime rate in conformity with changes by four out of eight money center banks, and further, defendants (the Georges) were granted the same prime rate as all other borrowers similarly situated(.)" Furthermore, Judge Revell found that "the term 'prime rate' as employed by United Kentucky Bank, Inc. and applied to the uncontroverted facts of this action, is not illusory and, therefore, not a breach of the contract between the parties(,)" and "Kenneth R. George is astute, sophisticated, and experienced borrowers (sic), as reflected in their affidavits in the record." Revell Op. at 2. Finally, the Judge adopted the stipulation of counsel that all loans which were "prime or prime related" were made at the same rate extended to the Georges.

Based upon those facts, Judge Revell found as a matter of law that the setting and charging of the prime rate by

the UKB was "not a breach of contract, fraud, or breach of fiduciary duty as to the defendants." Furthermore, "the calculation of interest on a 360-day basis is an overcharge of interest and, therefore, a breach of contract, but is not a fraud or breach of fiduciary duty, owed the defendants by the plaintiff." Revell Op. at 3.

Finally, after ordering that the plaintiffs recover the specified amounts of the notes from the defendants, Judge Revell ordered that "all counterclaims and affirmative defenses as filed by the defendants (the Georges) are hereby dismissed except as herein-before set out." Revell Op. at 5. The judgment was "final and appealable" under Kentucky CR 54.02(1). Revell Op. at 6. This Court notes in passing that Kentucky's CR 56 and Fed. R. Civ. P. 56 are essentially the same as are Kentucky's CR 54.02 and Fed. R. Civ. P. 54(b).

In this Court, the UKB argues that *res judicata* and collateral estoppel bar any further action by the Georges because this Court must give full faith and credit to the state court's determination. 28 U.S.C. §1738. The UKB argues that since the state court found that the UKB had not defrauded the Georges in the setting or charging of the floating interest rate, the George are precluded from asserting the RICO and Mail Fraud claims under collateral estoppel. The UKB further argues that the claim for fraud in the inducement is barred by *res judicata*.

In response, the Georges contend that (1) the state court reached its decision on a motion for summary judgment and, therefore, the decision is less binding than a decision reached after a full trial, (2) that the decision is on appeal and is not a "final" decision, (3) that the state court did not apply the same standard of "fraud" necessary to find "fraud" in RICO actions, and (4) that this Court has exclusive jurisdiction over RICO actions and, therefore, has exclusive jurisdiction over this case by pendent juris-

diction. Although the Georges' amended complaint contains ten (10) counts, the Georges principal concern appears to be Counts 1-3 (RICO) and Count 7 (Fraud in the Inducement).

This Court must give the same recognition to the judicial rulings of the Kentucky courts to which those rulings are entitled in Kentucky. 28 U.S.C. §1738. *St. John* v. *Wisconsin Employment Relations Board,* 340 U. S. 411, 414 (1951); *Rollins* v. *Dwyer,* 666 F. 2d 141, 144 (5th Cir. 1982). See, generally, 1B Moore's Federal Practice, Para. 0.416 [1] (2nd Ed. 1983). *Res judicata* provides that a final judgment on the merits bars all claims based upon the same complaint by the parties or their privities, including those claims which were not but could have been litigated. *Montana* v. *United States,* 440 U. S. 147, 153 (1979); *Brown* v. *Felsen,* 442 U. S. 127, 131 (1979); *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, 375 (1940). Collateral estoppel provides that once issues or facts which are necessary to the judgment are actually litigated and decided by a court of competent jurisdiction, any determination by that court is conclusive and binding on the parties in any subsequent suit between the parties, even if the second suit is based upon a different complaint. *Montana* v. *United States, supra; Allan* v. *McCurry,* 449 U. S. 90, 94-96 (1980). In essence, the parties are bound by issues and facts which have been adjudicated. See generally, *Kremer* v. *Chemical Construction Corporation,* — U. S. —, 102 S. Ct. 1883, 1889 n. 6 (1982); *Newman* v. *Newman,* 451 S. W. 2d 417, 419 (Ky. 1970); *Restatement (Second) of Judgments,* Sections 17, 18 and 27 (1982).

The essential question is whether the facts alleged by the Georges in this suit were before Judge Revell in state court. The "Actionable Facts" are alleged in Paragraphs 28-31 of the amended complaint. The Georges allege that the UKB regularly extended credit to other customers at

a lower rate than the Georges received. Para. 30 (x and xiii). The Georges also allege that the UKB set the prime rate at the UKB's "sole judgment, discretion, whim, and caprice . . . .", Para. 30(v); that the UKB misrepresented the method in which interest would be computed on a "per annum" basis by computing the interest on a 360-day basis instead of a 365-day basis, Para. 30 (vi, xi, and xii); that the UKB had a superior financial expertise and knowledge which allowed it to take advantage of the Georges, Para 30 (viii); and that the UKB misrepresented to the Georges that the maximum price rate would not exceed thirteen percent, Para. 30 (iii); and that the UKB made these misrepresentations to the Georges in the context of a long-standing financial relationship which constituted a breach of fiduciary duty, Para. 30 (vii). The Georges allege a RICO violation because the UKB used the mails to send the Georges their interest statements and bills.

This Court finds that Judge Revell reached or could have reached all these issues, with the exception of the RICO claims. Judge Revell found that there was no fraud in the establishment, calculation or application of the prime rate. The allegation of "whim and caprice" is countered by the Judge's finding of no arbitrary action on the part of the UKB. Judge Revell explicitly found that there was no specific intent to defraud because the UKB followed generally accepted industry practices by establishing its prime rate in reliance on "four out of eight money center banks," that the rate was not "illusory," and that other lenders similarly situated were granted the same rate as the Georges. *Supra.* Therefore, the Georges are precluded from raising any issues dealing with "fraud" in the establishment and application of the prime rate and the act of mailing the interest statements could not constitute a RICO violation. Thus, this Court dismisses Counts 1-3 (RICO), Count 4 (Common Law Fraud), and Count 5 (Misrepre-

sentation) of the amended complaint under collateral estoppel.

Judge Revell also found that the UKB had not been arbitrary in its calculation of the prime rate, that the prime rate was not a breach of contract, and that Mr. George was an experienced borrower. Therefore, this Court finds that these findings are *res judicata* defenses to Counts 4 and 5 above, as well as *res judicata* to Count 6 (Unconscionability) and Count 8 (Reformation of the Contracts). Moreover, Counts 4, 5, 6, 8, and 7 (Fraud in the Inducement) could have been asserted in the state court proceedings. Therefore, the state court judgment is *res judicata* to those Counts for this reason as well. *Chicot County* v. *Baxter State Bank, supra; Stephens* v. *Goodenough* 560 S. W. 2d 556, 558 (Ky. 1977).

The Georges prevailed in state court on the issue of "per annum" calculation of interest rates. Judge Revell held that the calculation of interest on a 360-day basis was a breach of contract but was not an act of fraud. Therefore, the state court judgment is *res judicata* to Count 9 (Declaratory Judgment—"Per Annum").

Finally, this Court finds that the Count 10 (Breach of Confidential Relationship) states a claim for fraud, breach of fiduciary duty and overreaching (unconscionability). Thus, the state court judgment is *res judicata* to this count as well . This Court has already dismissed Count 11 (Unfair Trade Practices).

In the alternative, Judge Revell overruled "all counterclaims and affirmative defenses" advanced by the Georges. Since the Georges incorporated the complaint and amended complaint in their answer, this Court finds that Judge Revell had all the facts and arguments which the Georges advance in this Court before him in state court. Therefore, that portion of Judge Revell's order also operates

as *res judicata* to all facts and issues in this complaint which were properly before the state court.

This Court rejects the arguments raised by the Georges. First, a decision based upon summary judgment is "valid" for purposes of both *res judicata* and collateral estoppel. "Both claim preclusion (*res judicata*) and issue preclusion (collateral estoppel) result from summary judgments that rest on the lack of any genuine issue of material fact going to the merits of the claim or defense." Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction,* Sec. 4444 (West 1981). See, e.g., *O'Neill* v. *Dell Publishing Company,* 630 F. 2d 690 (1st Cir. 1980); *Mayer* v. *Distal Tool & Machine Company,* 556 F. 2d 798 (6th Cir. 1977).

While the Georges do not directly argue that a summary judgment is inappropriate for claim and issue preclusion, they attack the point indirectly. The Georges argue in one of their briefs that since they were not the moving party on the motion for summary judgment, therefore they were not required to assert all their defenses, and that this fact detracts from the required "finality" of the state court decision. A party opposing summary judgment may not rely on the pleadings alone but must make some affirmative showing that a genuine issue of fact exists. *Neel* v. *Wagner-Shuck Realty Company,* 576 S. W. 2d 246, 250 (Ky. App. 1978); *Samuels* v. *Spangler,* 441 S. W. 2d 129, 131 (Ky. 1969); *Hayes v. Rodgers,* 447 S. W. 2d 597, 600-01 (Ky. 1969). Cf. *Adickes* v. *Kress Company,* 398 U. S. 144, 161 (1970); *Sherrod* v. *Piedmont Aviation, Inc.,* 516 F. Supp. 39, 45 (E.D. Tenn. 1978). Kentucky law requires that a party assert all claims and defenses in the same action. *Newman* v. *Newman, supra; Stephens* v. *Goodenough, supra.* Therefore, the Georges were required to contest the UKB's motion for summary judgment in state court with the requisite showing of a question of fact on each issue. The Georges did not meet that burden and

this Court cannot question the state court's judgment on its merits.

Second, this decision is "final" for purposes of *res judicata* and collateral estoppel while on appeal. The parties agree that the decision is *res judicata* while on appeal. See, e.g., *Fidelity Standard Life Insurance Company* v. *First National Bank,* 510 F. 2d 272, 273 (5th Cir., 1975); 1B *Moore's Federal Practice,* Para. 0.416[3] (2d Ed. 1983). However, the Georges argue that the state court decision is not final for purposes of collateral estoppel, relying on *Watson* v. *Roberts, Scott & Company,* 466 F. 2d 1348 (9th Cir. 1972). This Court must accord the same "full faith and credit" to the state court decision to which that decision is entitled in the rendering state under the rendering state's law. 28 U.S.C. §1738. In *Watson,* California law expressly provided that a state court judgment was not final for purposes of collateral estoppel while on appeal. 466 F. 2d at 1349. There is no similar statute in Kentucky.

The only Kentucky case which this Court can discover holds that " 'an appeal shall not stay proceeding on a judgment unless superedeas (sic) be issued.' " *Small* v. *Reeves,* 25 Ky. L. Rep, 729, 733, 76 S. W. 395, 397 (Ky. 1903) (dealing with *res judicata,* not collateral estoppel). See, also, *Smith* v. *Farmer's Bank of Vine Grove,* 21 Ky. L. Rep. 375, 376, 51 S. W. 451 (Ky. 1899). First, there is no record of any supersedeas bond having been filed in this case. Second, this Court notes that both *Small* v. *Reeves* and *Smith* v. *Farmer's Bank* were decided under the old Civil Practice Code, since repealed.

Under the new Civil Rules, which are similar to the Federal Rules, there are no reported decisions regarding this issue. Compare CR 62 with Fed. R. Civ. P. 62. With no other authority, this Court adopts the Federal Rule which provides that a decision pending appeal is entitled to both *res judicata* and collateral estoppel effect. *Huron*

Holding Corporation v. *Lincoln Mine Operating Company,* 312 U. S. 183, 188-89 (1941); 1B *Moore's Federal Practice,* Para. 0.416[3], *supra.*

The Georges also argue that the decision is not final because the UKB cannot enforce the judgment. The Georges have filed a petition in bankruptcy (in Florida) and no judgment can be enforced against the Georges under the automatic stay provisions to apply to the "enforcement" of a judgment against the debtor, not to the "finality" of a decision for purposes of prior adjudication [*sic*]. Cf. *Huron Holding Corporation, supra.* Otherwise, a debtor could continue to file "vexatious" litigation while avoiding the traditional bars of prior adjudication in judgments already rendered. This Court finds no support for this position and the Georges cite no authority for this interpretation of the Bankruptcy Code.

Third, Judge Revell's finding that there was no "fraud" in the UKB's actions is sufficient to act as collateral estoppel to fraud in a RICO action. The Georges argue that Judge Revell did not describe the "standard" by which he judged or defined the term "fraud," and that the standards for statutory fraud are more inclusive than the standards for common law fraud. Again, this Court disagrees.

Under Kentucky law, "fraud" consists of the elements of (1) a material misrepresentation, (2) which is false, (3) known to be false or made recklessly, (4) made with inducement to be acted upon, (5) acted in reliance thereon, and (6) causing injury. *Wahba* v. *Don Corlett Motors, Inc.,* 573 S. W. 2d 357, 359 (Ky. App. 1978); *Scott* v. *Farmer's State Bank,* 410 S. W. 2d 717, 720 (Ky. 1967). Specific intent to deceive, i.e., "scienter" is a required element. E.g., *Godley* v. *Piedmont Land Sales, Inc.,* 505 F. Supp. 397, 402 (E.D. Ky. 1978); *Bunch* v. *Bertram,* 219 Ky. 848, 851-52, 294 S. W. 805 (1927).

The Georges' RICO complaint is based upon an alleged mail fraud, 18 U.S.C. §1341. Specific intent is also a required elements of this offense. *United States* v. *Kreimer,* 609 F. 2d 126, 128 (5th Cir. 1980); *United States* v. *Shipp,* 359 F. 2d 185, 188 (6th Cir.), cert. denied, 385 U. S. 903 (1966). "The fraudulent nature of a scheme should not be measured by a technical standard. . . . 'The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity. . . . [*sic*]" *United States* v. *Stanford,* 589 F. 2d 285, 296 (7th Cir. 1978) (citations omitted); *United States* v. *Kreimer, supra.* In this case, Judge Revell found no specific intent to defraud. The Georges cite no authority demonstrating any difference between "specific intent" in a civil case and "specific intent" in a criminal case or "specific intent" in a RICO case. Therefore, Judge Revell's finding operates as a bar to any further action on the RICO claim.

Finally, the Georges argue that since this Court has exclusive jurisdiction over RICO claims, this Court has exclusive jurisdiction over *all* related claims arising out of the same nucleus of "operative facts." Therefore, the Georges argue the state court had no jurisdiction to determine the claims which were before it because those claims were also pendent to the RICO claims in this Court. Generally, federal courts may not enjoin state court proceedings. 28 U.S.C. §2283; E.g., *Lamb Enterprises, Inc.* v. *Kiroff,* 549 F. 2d 1055 (6th Cir. 1977). The fact that an exclusively federal question is raised as a defense to a contract action in state court does not justify the issuance of an injunction staying the state proceeding. *Avon Publishing Company* v. *American News Company,* 143 F. Supp. 516 (S.D. N.Y. 1956).

The plaintiff cites several cases which stand for the principle that a federal court acquires pendent jurisdiction over related claims when the Court acquires exclusive juris-

diction over one of the claims. That principle is undisputed. However, plaintiff cites no authority for the proposition that once *concurrent* jurisdiction is established, as in this case, federal court jurisdiction supersedes state court jurisdiction in regard to matters over which the state court has proper jurisdiction. While this Court *may* exercise jurisdiction over pendent claims such as those at issue in this case, this Court finds no authority for overruling a valid state court judgment adjudicating those claims, especially *after* the state court has reached a decision. This Court notes that the plaintiffs made no attempt to stay the state court proceedings pending completion of this case.

Had this case come before this Court prior to the state court's decision, this Court could have exercised pendent jurisdiction over the state court claims. However, this Court is now barred from that course by the principle of prior adjudication. Since this Court could not have enjoined the state court proceedings, this Court has no choice but to give full faith and credit to the resulting state judgment. While that judgment did not *directly* adjudicate the RICO claims in Counts 1-3, the judgment did preclude those claims by collateral estoppel.

In summary, this Court finds that the state court judgment disposes of this case on the principles of *res judicata* and collateral estoppel. If the judgment is reversed by the Kentucky Court of Appeals or the Kentucky Supreme Court, the parties may move to reopen the case. Rule 60(b)(5). See 1B *Moore's Federal Practice,* Para. 0.416[1], *supra.* This Court will consider any additional discovery matters should such an event occur. Therefore, this Court will file the plaintiff's surreply memorandum of August 15, 1983, sustain the defendant's motion to dismiss, and overrule all other motions.

A judgment in accordance with this memorandum opinion will be entered this day.
Dated 9/30/83

(s) Charles M. Allen
Charles M. Allen, Chief Judge

cc: Counsel of Record

DISTRICT COURT JUDGMENT

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 82-0021 L (A)

KENNETH R. GEORGE and
ALBERTA W. GEORGE, - - - - - *Plaintiffs,*

v.

UNITED KENTUCKY BANK, INC.,
UNITED KENTUCKY, INC., and
DOES 1-99, - - - - - - - - *Defendants.*

JUDGMENT

This case, having come before the Court on various motions, and the Court, having been advised, and having entered its memorandum opinion this day, therefore,

IT IS ORDERED AND ADJUDGED that the plaintiffs' motion to file a surreply brief be, and the same hereby is sustained, and the Clerk shall file the surreply brief.

IT IS FURTHER ORDERED AND ADJUDGED that the defendants' motion to dismiss be and the same hereby is sustained.

IT IS FURTHER ORDERED AND ADJUDGED that all other motions be and the same are hereby overruled.

This is a final and appealable judgment and there is no just cause for delay.

Dated: September 30, 1983

(s) Charles M. Allen, Chief Judge

cc: Counsel of Record

JEFFERSON CIRCUIT COURT SUMMARY JUDGMENT

JEFFERSON CIRCUIT COURT

FOURTH DIVISION

No. 81 CI-09925

UNITED KENTUCKY BANK, INC. (formerly doing business as Louisville Trust Bank) - - *Plaintiffs*

v.

KENNETH R. GEORGE, ET AL. - - - *Defendants*

SUMMARY JUDGMENT

The motion of the plaintiff, United Kentucky Bank, Inc., having been made for summary judgment pursuant to CR 56, and it appearing that there are no material issues of fact, the Court finds that:

1. (a) The plaintiff, United Kentucky Bank, Inc., calculated interest on the loans for the defendants on a 360 day basis. The Court is of the opinion that this traditional practice is not acceptable with the use of modern computer technology and, therefore, the defendants are entitled to a credit on the amounts granted by this judgment in the sum of $11,022.58 for over charges on interest on the notes of the action to March 1, 1981;

(b) The defendants claim of breach of fiduciary duty and fraud for the plaintiff's calculation using the 360 day basis is unfounded due to the established industry practice followed and lack of intent by the plaintiff;

(c) That the plaintiff has not been arbitrary in calculation of its prime rate by using the methodology of adjusting its prime rate in conformity with charges by four out of eight money center banks, and further, defendants

were granted the same prime rate as all other borrowers similarly situated;

(d) That as to the mortgage recorded at Mortgage Book 1809, Page 918, in the office of the clerk of Jefferson County, and the note for $250,000.00 dated October 26, 1987, and being all of count three of plaintiff's complaint, was not in default at the time of filing of the complaint, and further the mortgage not providing security to any other debts of the defendants due to certain portions of the mortgage not being properly completed, the plaintiff's complaint is dismissed as to count three without restraint on the plaintiff to refile its complaint for a default occurring after October 28, 1981;

(e) That the term "prime rate" as employed by United Kentucky Bank, Inc. and applied to the uncontraverted facts of this action, is not illusory and, therefore, not a breach of the contract between the parties;

(f) That Kenneth R. George is astute, sophisticated, and experienced borrowers, as reflected in their affidavits in the record [*sic*];

(g) That the stipulations of counsel dated October 21, 1981 are hereby adopted as findings of this Court.

2. As a matter of law, the setting and charging by United Kentucky Bank, Inc. of its prime rate is not a breach of contract, fraud, or breach of fiduciary duty as to the defendants.

3. As a matter of law, the calculation of interest on a 360 day basis is an overcharge of interest and, therefore, a breach of contract, but is not a fraud or breach of fiduciary duty, owed to the defendants by the plaintiff.

4. That United Kentucky Bank, Inc. is entitled, as a matter of law, to judgment on the five (5) notes attached to its complaint and marked as Exhibits 1, 4, 6, 7 and 11.

5. That the pleadings having been closed, all amendments after June 1, 1982, were not allowed filed.

6. That all previous interlocutory orders are made final by this order.

ORDER

Therefore, it is the order of this Court that:

1. The plaintiffs recover of the defendants, Kenneth R. George and Alberta W. George, and each of them, jointly and severally, the sum of $723,791.69, plus accrued interest of $143,961.07, calculated on the 365 day basis, plus interest thereon at the rate of the prime rate of interest charged by United Kentucky Bank from time to time, plus one-half percent (½%) per annum from October 15, 1982, plus costs expended by plaintiff herein, until judgment, and interest at the prevailing statutory rate from the date of judgment until paid.

2. That the plaintiff recover of the defendants, Kenneth R. George and Alberta W. George, and each of them, jointly and severally, the principal sum of $1,158,268.92, with accrued interest of $242,236.90, calculated on a 365 day basis, plus the prime rate of interest as charged by United Kentucky Bank from time to time, plus one and one-half percent (1½%) per annum from October 15, 1982, plus costs expended by plaintiff herein, until judgment, and interest at the prevailing statutory rate from the date of judgment until paid.

3. That plaintiff recover of the defendants, Kenneth R. George and Alberta W. George, doing business as Yorktown Lumber Company, and each of them, jointly and severally, the principal sum of $150,000.00, plus accrued interest of $30,419.16, calculated on a 365 day basis, and interest at the prime rate of interest as charged by United Kentucky Bank from time to time, plus one percent (1%)

per annum from October 15, 1982, plus costs expended by plaintiff herein, until judgment and interest at the prevailing statutory rate from the date of judgment until paid.

4. That the plaintiff recover of the defendants, Kenneth R. George and Alberta W. George, doing business as Yorktown Lumber Company, and each of them, jointly and severally, the principal sum of $50,000.00, plus accrued interest of $9,822.53, calculated on a 365 day basis, at the prime rate of interest as charged by United Kentucky Bank from time to time plus one-half percent (½%) per annum from October 15, 1982, plus costs expended by plaintiff herein, until judgment, and interest at the prevailing statutory rate from the date of judgment until paid.

5. The plaintiff recover of the defendants, Kenneth R. George and Alberta W. George, and each of them jointly and severally, the principal sum of $50,000.00, plus accrued interest of $9,882.63, from October 15, 1982, calculated on the 365 day basis, at the prime rate of interest charged by United Ketnucky Bank, Inc. from time to time, plus one-half percent (½%) per annum from October 15, 1982 until date of judgment until paid, plus costs expended by the plaintiff herein, and interest from the date of judgment at the prevailing statutory rate until paid.

6. That all counterclaims and affirmative defenses as filed by the defendants are hereby dismissed except as hereinbefore set out.

7. That the plaintiff shall tender an order of sale consistent with its complaint and this order.

8. The attorneys for the plaintiffs are entitled to a fee for their services rendered herein, this matter is hereby retained for further proceedings.

9. Pursuant to CR 54.02(1), it is adjudged that this is a final and appealable judgment, and there is no just reason for delay.

(s) Richard A. Revell
Judge, Jefferson Circuit Court
Date: October 25, 1982

Tendered By:

(s) Richard Frockt
Richard Frockt
Thurman L. Sisney
Barnett & Alagia
1700 Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 585-4131
Counsel for United Kentucky Bank

TEXT OF RELEVANT STATUTES
TITLE 18 UNITED STATES CODE
Mail Fraud

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

RICO

§ 1961. Definitions

As used in this chapter:

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from

interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling business), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the

United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser,

the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

TITLE 28 UNITED STATES CODE
Supreme Court Jurisdiction

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and

the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Full Faith and Credit

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

CASE CHRONOLOGY

CASE	DATE	EVENT
State	10/27/81	Liberty filed a complaint in Jefferson County Circuit Court, Case No. 81-CI-09925, for collection of notes and foreclosure on collateral including real and personal property and guaranties.
Federal	1/11/82	The Georges filed their complaint in the Federal District Court, alleging fraud, breach of contract, breach of fiduciary duty, and RICO violations by mail fraud.
State	1/11/82	The Georges filed their petition for removal of the state action to federal court.
State	11/13/82	The Georges filed a perfunctory answer in the removed state case.
State	2/23/82	The removed case was remanded to state court for lack of subject matter jurisdiction (incomplete diversity and no federal question).
State	3/ 1/82	The Georges filed a "Supplemental Answer" in state court incorporating their January 11 federal court complaint as a defense in the state court action.
State	6/ 4/82	A default judgment was entered in the State court proceeding against the Georges as a sanction for failure to obey the court's orders concerning discovery.

Case	Date	Event
Federal	6/22/82	The Georges filed their first amended complaint in the federal court, which by its terms merely "restates and clarifies" the original complaint.
State	7/15/82	The default judgment in the state court action was set aside.
State	8/20/82	Liberty filed its motion for summary judgment in the state court.
State	10/11/82	First hearing on summary judgment.
State	10/21/82	Second hearing on summary judgment.
Federal	10/21/82	The Georges offered an amendment to their complaint to include a claim of fraudulent inducement. The amendment was not permitted to be filed, due to the Georges having promised no further alterations of the complaint as partial consideration for having the default judgment set aside.
State	10/25/82	Summary Judgment for Liberty was entered in the state court.
State	11/ 4/82	The Georges filed a motion to alter, amend, or vacate the summary judgment, which was shortly thereafter denied.
State	11/25/82	The Georges filed a motion of appeal of the summary judgment.
Federal	6/13/83	Liberty filed its motion to dismiss in federal court on the grounds of *res judicata* and collateral estoppel.
Federal	9/30/83	Dismissal was granted to Liberty.

Case	Date	Event
Federal	10/12/83	The Georges filed a notice of appeal of the dismissal.
State	2/ 2/84	The Kentucky Court of Appeals Affirmed the Jefferson Circuit Court's summary judgment.
State	3/14/84	The Georges filed a petition for rehearing in the Kentucky Court of Appeals, which was subsequently denied.
State	7/18/84	The Georges filed a motion for discretionary review by the Kentucky Supreme Court.
State	11/ 8/84	Discretionary Review by the Kentucky Supreme Court Was Denied.
Federal	1/22/85	The Sixth Circuit Affirmed the District Court's dismissal *except* for the fraudulent inducement claim re RICO.
Federal	2/ 4/85	Liberty filed a petition for rehearing in the Sixth Circuit.
Federal	2/21/85	Liberty's petition for rehearing was denied.
State	2/ 6/85	The Georges filed for certiorari in the U. S. Supreme Court regarding the Kentucky Supreme Court decision. The petition was denied April 1, 1985.
Federal	2/22/85	The Georges filed for certiorari in the U. S. Supreme Court regarding the Sixth Circuit decision. The petition was denied April 15, 1985.

KENTUCKY PRECLUSION RULES

1. *Res Judicata*

In Kentucky there are three conditions for the application of res judicata: there must be (a) identical parties, (b) identical causes of action, and (c) a decision on the merits in the prior case. If these conditions are met, the first action will be res judicata not only as to all claims issues which were presented and adjudicated, but also "to all causes that should have properly been presented." *Newman* v. *Newman,* 451 S. W. 2d 417 (Ky. 1970); see also, *Lawlor* v. *National Screen Service Corporation,* 349 U. S. 322, 75 S. Ct. 865, 99 L. Ed. 1122 (1955).

2. *Collateral Estoppel.*

In Kentucky, collateral estoppel applies where res judicata does not, because either the causes of action or the parties are not the same. Such estoppel will apply to all issues of fact which were actually litigated and determined. *Ward* v. *Southern Bell Telephone and Telegraph Co.,* 436 S. W. 2d 794 (Ky. 1968), *overruled on other grounds, Commonwealth of Kentucky, Dept. of Transportation, Bureau of Highways* v. *Louisville Gas & Electric Co.,* 526 S. W. 2d 820 (Ky. 1975); see also, *Lawlor, supra; Montana* v. *United States,* 440 U. S. 147, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979).

REFUSED AMENDMENT TO RESPONDENTS' COMPLAINT

JEFFERSON CIRCUIT COURT

FOURTH DIVISION

No. 81 CI-09925

UNITED KENTUCKY BANK (formerly doing business as Louisville Trust Bank) - - *Plaintiff*

v.

KENNETH R. GEORGE, et al. - - - - *Defendants*

MOTION TO FILE AMENDED ANSWER AND COUNTERCLAIM

Come the defendants, by counsel, and respectfully move the Court to allow them to amend their Answer and Counterclaim heretofore filed in this action to include as an affirmative defense the following:

AFFIRMATIVE DEFENSE

"Plaintiff fraudulently induced the defendants to enter into a contractual relationship between the parties and sign the notes in question in that the plaintiff, before defendants made any promissory notes, plaintiff [*sic*] United Kentucky Bank and its employees, agents and servants were possessed of no reasonable expectation that the prime rate of said bank would ever exceed the absolute maximum 12%. This representation was made by plaintiff United Kentucky Bank acting through its agents, servants and employees, in order to induce defendants to make the promissory notes payable to plaintiff, United Kentucky Bank, including the variable interest rate.

"Said representation was made by plaintiff UKB, acting through its agents, servants and employees in response

to inquiry from defendants to plaintiffs UKB, its agents, servants and employees, made in order to know the maximum limit within which defendants could reasonably expect the interest rates on the promissory notes to vary. Defendants relied on the truth of the aforesaid representation by plaintiff UKB, acting through its agents, servants and employees in agreeing to make the promissory notes. Without the aforesaid representation to defendants that, as a matter of fact, it would be unreasonable for defendants to expect the prime rate of plaintiff UKB to ever exceed twelve (12%) percent, defendants never would have made the promissory notes."

In all other respects, defendants would reiterate and reaffirm the Answer, Supplemental Answer, and Counterclaim heretofore permitted filed.

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and

Amshoff & Amshoff

By (s) Theodore H. Amshoff, Jr.
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Counsel for Defendants

CERTIFICATE

I hereby certify that a copy of the foregoing was served by hand delivery this 21st day of October 1982, to Richard Frockt, Esq., Attorney for Plaintiff, Kentucky Home Life Building, Louisville, Kentucky.

(s) Theodore H. Amshoff, Jr.

Office-Supreme Court, U.S.
FILED
JUN 24 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1830

In the Supreme Court of the United States

October Term, 1984

LIBERTY NATIONAL BANK & TRUST COMPANY OF LOUISVILLE (f/d/b/a UNITED KENTUCKY BANK, INC.),
Petitioner,

vs.

KENNETH R. GEORGE and ALBERTA W. GEORGE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

In the petition (pp. 3-8), Petitioner includes a misrepresented statement of the case. Throughout this litigation, misstatements by Petitioner to various courts have remained a continuing and serious problem. Because of this, Respondents must include an accurate account of the case in order for this court to know the context of what is presented for review.

Because it cannot be improved, Respondents adopt and incorporate here as their counter-statement of the case the statement on pp. 3-8 of the case included in their petition for certiorari. For convenience, those pages are included as Appendix A hereto.

But, Respondents would particularly highlight misstatements of the case of critical significance to claims made by Petitioner in this petition. On p. 4, third paragraph, second line of the petition [also see petition pp. 8 (fn. 2), 12 (fn. 4) and 15] Petitioner states, and would have this court believe, that Respondents, in the state proceedings below, filed counterclaims. This simply is not so, and Petitioner knows it is not true. Respondents, in the state court action, filed affirmative defenses *only*. Respondents, in the state court, *sought no affirmative relief* from the state court, and all claims made by Respondents were made in defense for no purpose other than to block the effort of Petitioner in its attempt to be awarded affirmative relief against Respondents.

Counsel for both sides and the court, in the state court proceedings, from time to time, erroneously referred to the affirmative defenses of Respondents as counterclaims. However, the record clearly speaks for itself and clearly reveals that Respondents never made any counterclaims.

Petitioner also attempts to leave with this court the false impression that the attempt of Respondents, in state court, to amend its defensive pleading (falsely stated by Petitioner to be a counterclaim) to include an affirmative defense of fraudulent inducement was an afterthought and an eleventh hour act of desperation in violation of a previous order of the state court to close the pleadings.

In fact, both Petitioner and Respondents proceeded on the assumption that the affirmative defenses pled by Respondents in the state court included a defense of fraudulent inducement. The memorandum of law filed by Petitioner in support of its motion for summary judgment includes a section devoted to an attempt to overcome the affirmative defense of fraudulent induce-

ment included in Respondents' responsive pleading. In the memorandum of law filed by Respondents in opposition to the motion for summary judgment, the thought that the affirmative defenses pled by Respondents included fraudulent inducement is unmistakable.

It was only in the context of argument before the state court on the motion for summary judgment filed by Petitioner that any question was raised concerning the fraudulent inducement affirmative defense. In that hearing, the court was stating its intention to enter a summary judgment and attempting to justify that decision. Counsel for Respondents noted, in response to the court, that Respondents had raised an issue concerning fraudulent inducement and, even if every other thing the court had stated as justification were true, whether there had been fraudulent inducement was indisputably a jury issue, and that Respondents intended to exercise their right to a jury determination.

Then, for the first time, the court stated that it did not consider that fraudulent inducement had been pled by the pleadings filed by Respondents. Therefore, the court said, a right to a jury determination on the fraudulent inducement issue was summarily pretermitted. *Then,* and only then, did Respondents ask permission to amend their responsive pleading so as to plead the affirmative defense of fraudulent inducement in a manner consistent with what the trial court seemed to think was necessary. The trial court *then* fell back on its previous order that the pleadings were closed, holding, therefore, that no amendment would be allowed. The court *then* proceeded on the assumption that Respondents had incurably failed to plead fraudulent inducement in defense. This was the classic Catch-22. This cleared the way for the court to enter the summary judgment which, at the outset, it convened to do.

SUMMARY OF ARGUMENT

It should first be noted that Respondents join with Petitioner in the belief that the decision by the Sixth Circuit which Petitioner seeks to have reviewed is rife with serious error of large magnitude and far-reaching consequence. The fact that the case was remanded by the Sixth Circuit to the district court for a trial restricted to one of the issues raised by Respondents' complaint, because of the prior erroneous holdings of the district court which were affirmed by the Sixth Circuit, provides little more than a seed bed for continuing an unnecessary controversy. Tried in its present state, one can be assured that the trial will result in many additional errors as perceived from the perspective of both adversarial sides. In other words, subsequent appeals and, most probably, subsequent petitions for certiorari to this court are inevitable if this case proceeds on the present state of the record.

Respondents have previously filed a petition for certiorari to this court in this case and earnestly believe, and sought to persuade this court, that this is one of those exceptional cases which demands review by this court. However, this court saw fit to deny Respondents' prior petition for certiorari. *Kenneth R. George and Alberta W. George v. The Liberty National Bank and Trust Company of Louisville, United Kentucky, Inc. and Does 1-99*, No. 84-1392.

The only opposition Respondents have to the present petition for certiorari is that it seeks to limit the issues so as to avoid this court's review of issues much more demanding of attention. Two of the issues which Petitioner seeks to have reviewed will be pretermitted any day by this court's decisions in *Sedima, S.P.R.L. v. Imrex Co., Inc.*,

741 F.2d 482 (2d Cir. 1984), *cert. granted,* ..... U.S. ....., 105 S.Ct. 901 (1985), Case No. 84-648 and *Haroco v. American National Bank & Trust Company of Chicago,* 747 F.2d 384 (7th Cir. 1984), *cert. granted sub nom., American National Bank and Trust Company of Chicago v. Haroco,* ..... U.S. ....., 105 S.Ct. 902 (1985), Case No. 84-822. These decisions are sure to be rendered before this court disposes of this petition.

RESPONSE TO QUESTION 1

What is most notable about the statement of Question 1 by Petitioner is that it is based on a false premise. At first blush the argumentation seems persuasive. But, when the straw man, built on Petitioner's false statements of factual predicates, is revealed, the underpinnings of the argument collapse, and the facade by which Petitioner seeks to mislead this court becomes evident.

Stated in a way consistent with the facts and record, the issue sought to be raised by Petitioner must include essential elements left out by Petitioner. That is, the issue is: (1) when a person who lives in a state different from another person against whom he wishes to make a claim; (2) is sued in the home state of the person against whom he wishes to make a claim by the person against whom he wishes to make a claim; (3) joined with other state court defendants whose residence is the same as that of the person against whom the out of state person wishes to make his claim; (4) and, before the out of state person is required by the law of the state to answer the state court claims; (5) he makes his claims in federal court according to his right under federal law; (6) must that person make those same claims as counterclaims in the state court; (7) or suffer bar by res judicata if the state court litigation concludes prior to the federal suit. This

is precisely what happened at the trial court (both state and federal) level in the instant case. The Sixth Circuit corrected the error of the district court. Now, Petitioner seeks to have this court reinstate the error of the district court as the law of the land. Respondents complained that the Sixth Circuit erred in that it only corrected that portion of the error of the district court which dealt with the fraudulent inducement issue. The Sixth Circuit found that there was a legally significant difference in whether the state trial court intended to rule or, as was the case with reference to the fraudulent inducement issue, explicitly failed to rule.

Reduced to its essence, the issue is whether the federal statutory right under Title 28, United States Code §1332 or state rules of procedure pertaining to counterclaims, even in the face of a pending federal court claim in a diversity case, holds sway one over the other. Petitioner claims that state procedural rules concerning counterclaims negate the federal statutory right to a federal forum. Respondents claim that such an interpretation would be a clear violation of the United States constitutional protections of due process of law and the Supremacy Clause. (Constitution of the United States, Article VI, Cl. 2). This court, purely by way of dicta and without even a suggestion as to what the proper answer might be, recognized the pertinency of the question late last year in its opinion in *Migra v. Warren City School District Board of Education*, ... U.S. ....., 79 Law. Ed. 2d 56, 65 (1984)

RESPONSE TO QUESTION 2

It is true that the question of whether state courts have jurisdiction over federal RICO suits is important. However, one question relative to this subject is beyond doubt.

If a claimant under the federal RICO statute files his claim in federal court and does not waive entitlement to a federal forum, it is impossible to force that federal court plaintiff to give up his right to a federal forum for resolution of the federal RICO question. This cannot be done via a state rule of procedure or by any other means.

The only case to clearly deal with the subject is *Greenview Trading Company, Inc. v. Hershman and Leicher, P.C.*, 473 N.Y.S. 2d 722 which held that state courts have jurisdiction over federal RICO claims made in state court. However, on May 28, 1985, the Appellate Division, First Department of the New York Supreme Court reversed that opinion in *Greenview Trading Company, Inc. v. Hershman and Leicher, P.C.*, ... N.Y.S. 2d ....., Docket No. 22790 (1984). This was reported in "The National Law Journal," June 17, 1985, at p. 10. The only other case known to have addressed the issue is *Luebke v. Marine National Bank of Neenah*, 567 F. Supp. 1460 (E.D. Wis. 1983) which suggested that state courts could exercise jurisdiction over the federal RICO statute.

However, in the instant case the federal RICO claims were made in federal court by a federal court plaintiff in a case where there was complete diversity between the plaintiffs and the defendant. These claims were pending in federal court before the federal court plaintiff was required to answer a state court foreclosure suit. A federal court plaintiff never waived or gave up in any way the right to a federal forum to adjudicate the federal RICO's claims.

RESPONSES TO QUESTIONS 3 AND 4

These questions are pretermitted by the eminent decision of this court in *Sedima* and *Haroco*.

CONCLUSION

Respondents agree with Petitioner that the Sixth Circuit erred in its decision, and that the error has grave consequences. Therefore, Respondents do not oppose this Court's granting of a writ of certiorari, but oppose the limitation of review to those issues sought to be reviewed by the petition and would request review of the issues raised in Respondents' prior petition for certiorari.

Respectfully submitted,

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APPENDIX A

STATEMENT OF THE CASE

[3] The appeal which produced the opinion which this petition seeks to have reviewed was from a judgment on the pleadings by the district court dismissing the complaint by granting the Respondents' motion to dismiss based on *Federal Rules of Civil Procedure,* Rule 12(b)(6).

Because the chronology of pleading is important to the application of controlling substantive law, Petitioners will recite the order of relevant events in detail. The unfolding of this chronology will reveal the inter-relationship of the instant case and a separate state court proceeding [now pending before this court in the form of a petition for certiorari in *Kenneth R. George and Alberta W. George v. Liberty National Bank and Trust Co. of Louisville,* No. 84-1253 considered by the district court to control the instant case through collateral estoppel and res judicata.

On **October 27, 1981,** Respondent, United Kentucky Bank, Inc. (hereafter "UKB"), filed a complaint against Petitioners in the Jefferson County, Kentucky Circuit Court initiating a case bearing Docket No. 81CI-09925. This complaint alleged that Petitioners had breached alleged promissory notes, mortgages, and a guaranty agreement. In short, this state court complaint initiated a, more or less, routine mortgage foreclosure suit.

On **January 11, 1982,** Petitioners filed the complaint in the instant case. (App. D) Jurisdiction (a particularly important point) by the district court was invoked both on diversity and exclusive subject matter jurisdiction. The complaint made affirmative allegations against Respondents

alleging violation of Title 18, *United States Code*, §1962 ("RICO"), and Title 15, *United States Code*, §1 (Sherman Antitrust Act).

[4] The context of the allegations in the instant case was the *relationship* existing between Petitioners and Respondents which resulted in events which occurred because of those loans. This same relationship spawned the state court suit. By the complaint filed in federal court, Petitioners, in effect, pled that the notes and mortgages were instruments of fraud used by Respondents to wrongfully injure Petitioners. Petitioners alleged that Respondent's, UKB, state suit was filed as a part of and in furtherance of the mail fraud by Respondents. Whether Petitioners are entitled to prevail in the district court is not controlled by whether the instruments, viewed outside the context of the mail fraud *first charged* in Petitioners' federal suit, are valid or invalid.

On **January 13, 1982,** Petitioners filed an answer stating: (1) the state complaint failed to state a claim; (2) the mortgages had been released; (3) service of process was insufficient; (4) the state court lacked jurisdiction; and (5) a general denial of all factual allegations.

On **March 1, 1982,** Petitioners filed a supplemental answer to the state complaint. The supplemental answer described what was set out therein as follows:

> [s]how as *additional defenses* to the claims of Plaintiff . . . particularly described in the copy of said Complaint, attached hereto, incorporated by reference herein, ... (emphasis added)

The complaint incorporated is the one filed in the instant case on January 11, 1982.

On **June 10, 1982,** the district court below entered an order (App. E) overruling the motion of Respondents to dismiss the January 11, 1982 complaint for failure to state a claim.

[5] On **August 20, 1982,** Respondents filed a motion for summary judgment (App. F) in the state court. The motion for summary judgment sought nothing more than a summary adjudication that Petitioners were liable for breach of the notes, mortgages and guaranty.

On **September 10, 1982,** in the state case, Petitioners filed a sworn affidavit by one of the Petitioners making oath to numerous facts. (App. G)

On **October 25, 1982,** the state court entered a written order granting the summary judgment. (App. H) It is this summary judgment which the district court found to have sufficient preclusive effect to bar further adjudication in the instant case. (App. B, pp. A9-A19)

On **June 15, 1983,** Respondents, in the instant case, filed a document entitled "Motion To Dismiss Plaintiffs' Complaint Upon Theory of Res Judicata, Collateral Estoppel and/or The Full Faith and Credit Requirements of Title 28, *United States Code*, §1738."

It was this motion which the district court granted by its memorandum opinion and judgment entered **September 30, 1983.** (App. B, C)

The Sixth Circuit decided the appeal and filed its opinion (App. A) on **January 22, 1985.**

Summarizing the significant events occurring below for present purposes, Petitioners will direct the attention of this court to the crucial facts. Petitioners filed a complaint against Respondents in federal court alleging violations of RICO and the Sherman Act seeking remedy un-

der Title 18, *United States Code,* §1964 and Title 15, *United States Code,* §15. The RICO claims essentially amount to allegations that Respondents overcharged interest, deliberately and intentionally, by inducing Petitioners into a borrower relationship and, in furtherance of the scheme [6] and device accomplished by *mail* fraud, engaged in various specific acts including, but not limiting to, filing the state suit instituted by Respondent, UKB. In addition, the federal suit filed by Petitioners alleges pendent claims seeking relief under the common law for breach of fiduciary duties, breach of confidence, breach of contract and other such claims.

Petitioners filed suit in federal court relying on the provisions of Title 28, *United States Code,* §1332(a) because of *complete diversity* of citizenship.

Thereafter, Petitioners answered the state suit with general denials. In addition, by incorporation of Petitioners' federal complaint, Petitioners supplemented their answer with affirmative defenses.

In the state court suit, Respondent, UKB, filed a motion for summary judgment in accordance with the very ordinary provisions of *Kentucky Rules of Civil Procedure,* Rule 56, and Petitioners routinely filed a written memorandum in opposition and a sworn affidavit of one of the Petitioners and, thereby, offered proof on virtually every issue material to the claimed right to summary judgment including, but not limited to, the amount owed.

The state trial court entered a summary judgment precisely as requested by Respondent, UKB, *and more.* The state court went beyond the relief sought by the summary judgment and included in the summary judgment a finding that Respondent, UKB, had not been guilty of fraud and had not breached any fiduciary duty to Petitioners.

The motion for summary judgment did not seek a finding on the issue of fraud or fiduciary duties and, if Petitioners had failed to produce competent proof that there was a genuine issue in dispute on a material fact *essential to the summary judgment sought*, the summary [7] judgment could have been entered without any reference to or finding concerning fraud or fiduciary duties. Respondent, UKB, did not move for a summary judgment ruling that it did not defraud Petitioners nor breach any fiduciary duties. The summary judgment motion did not put Petitioners *on notice* that Petitioners were expected to defend against entry of a summary judgment adjudicating that Respondent, UKB, was not guilty of fraud and had not breached fiduciary duties. Petitioners conceded that these were matters of fact that could only be resolved after a plenary hearing and consideration of proof by the *jury demanded by Petitioners.*

In the federal suit filed by Petitioners, Respondents, United Kentucky, Inc. and Does 1-99, were parties-defendant. In the state suit, these Respondents were not parties in any capacity. The district court held that the state summary judgment in favor of Respondent, UKB, precluded the entire federal case and dismissed it in its entirety, including the claims against Respondents, United Kentucky, Inc. and Does 1-99.

The district court, after entry of the state summary judgment, dismissed the entire federal complaint filed by Petitioners because the state court included language in the summary judgment concluding the absence of fraud and that there had been no breach of fiduciary duty. The Sixth Circuit decision agreed with the district court except as to the specific allegations by Petitioners' federal suit relative to fraudulent inducement both as a matter of common law and, if the mails were used, as predicate offenses supporting RICO.

The district court was affirmed by the Sixth Circuit in holding that, although the RICO claims in the federal suit, being exclusive to federal jurisdiction, were not subject to preclusion by res judicata, the doctrine of collateral estoppel created a bar to further consideration. The district [8] court reached this conclusion because of the "no fraud" language by the state court.

As to the pendent claims, the district court was affirmed by the Sixth Circuit in the conclusion that the state court had concurrent jurisdiction to adjudicate the common law claims and, since the state court either did or "could have" ruled on those claims, the entry of the summary judgment in state court precluded the district court from further consideration of them because of the doctrine of res judicata.